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ZACHARIAH JUDSON RUTLEDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

* * * *

3 ZACHARIAH JUDSON RUTLEDGE,) CASE NO.: CV 07-04274 CW
4 Plaintiff,)
5 vs.)
6 COUNTY OF SONOMA, MICHAEL)
7 POTTS, RUSSEL L. DAVIDSON,)
8 JAMES PATRICK CASEY, CHRISTINE)
9 M. COOK, BEAU R. MARTIN,)
10 J. MICHAEL MULLINS, STEPHAN R.) Date: June 12, 2008
11 PASSALACQUA, GREG JACOBS,) Time: 2:00 p.m.
12 SONOMA COUNTY SHERIFF'S) Courtroom: 2 (4th Floor)
13 DEPARTMENT, SONOMA COUNTY)
14 DISTRICT ATTORNEY'S OFFICE,) Judge: Hon. Claudia Wilken
15 and DOES 1 through 40.)
16 Defendants.)
17)
18)
19)
20)
21)
22)
23)

J.

DEFENDANT'S ARGUMENT THAT THE STATE LAW CLAIMS ARE BARED BY A FAILURE TO FILE A TIMELY CLAIM IS WITHOUT MERIT

A. DEFENDANT MICHAEL POTTS WAS ACTING AS AN AGENT OF THE SONOMA COUNTY SHERIFF'S DEPARTMENT AT THE TIME OF THE INCIDENT.

Plaintiff alleged in the complaint¹ that Defendants MICHAEL POTTS (hereinafter “POTTS”) and DOES 1 through 10 were acting as agents of the Sonoma County Sheriff’s Department. (SAC ¶ 11) Under a separate theory of liability, Plaintiff also alleged that Defendants MICHAEL POTTS and DOES 1 through 10 were acting as agents of the California Department of Justice Bureau of Forensic Services (hereinafter “DOJ”) (SAC ¶ 9)

“The determination whether a particular official acts for the state, on the one hand, or for the local governmental unit, on the other hand, is a question of law depending primarily upon the definitions of the official's functions contained in state constitutional, statutory, and decisional law.” *County of Los Angeles v. Superior Court (Peters)* (1998) 68 Cal.App.4th 1166, 1171 “The law of agency recognizes the possibility of dual employment. Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable [to third parties] for the employee's torts. This is especially true where the loaned employee performs work of interest to both the general and special employers.” *Societa Per Azioni De Navigazione Italia v. City of L.A.* (1982) 31 Cal. 3d 446, 460

“Courts have thus consistently ‘decline[d] ‘to draw a distinction between different agencies under the same government, focusing instead upon the ‘prosecution team’ which includes both investigative and prosecutorial personnel.’” *City of Los Angeles v. Superior Court*

¹ All references to the complaint and/or Second Amended Complaint are used interchangeably, and reference the Second Amended Complaint (Doc 13) and are also referenced herein as “SAC”.

1 (Brandon) (2002) 29 Cal.4th 1, 29 (citing *United States v. Auten* (5th Cir. 1980) 632 F.2d 478,
 2 481.)

3 [A] Sheriff acts for the County, not the state, when investigating crime in the county,”
 4 *Brewster v. Shasta County* (2001 9th Cir.) 275 F.3d 803, 807 Likewise, Defendant POTTS was
 5 acting as an agent of Sonoma County, in his capacity as and agent of the Sonoma County
 6 Sheriff’s Department when he was a member of the prosecutorial team in the underlying criminal
 7 matter.

8

9 **B. SINCE MICHAEL POTTS WAS ACTING AS AN AGENT OF THE SONOMA
 10 COUNTY SHERIFF’S DEPARTMENT AT THE TIME OF THE INCIDENT, SONOMA
 COUNTY IS LIABLE FOR THE INJURIES PROXIMATELY CAUSED BY HIS ACT
 OR OMISSION.**

11 Cal Gov Code § 815.2(a) provides,

12 (a) A public entity is liable for injury proximately caused by an act or omission of
 13 an employee of the public entity within the scope of his employment ...

14 "The effect of [Government Code section 815.2] is to incorporate 'general standards of
 15 tort liability as the primary basis for respondeat superior liability of public entities. Thus, in a
 16 cause of action for negligence, the existence and extent of an entity's vicarious liability under
 17 Government Code section 815.2, subdivision (a), will be determined by the scope of the duty
 18 legally attributed to its employees. A public employee is liable for negligence to the same extent
 19 as a private person." *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 942

20 Here, Defendant POTTS, within the scope of his employment, failed to provide a full
 21 examination of the key piece of evidence that provided probable cause to hold the plaintiff to
 22 answer on double murder charges. He also falsified his report with respect to his findings, thus
 23 he proximately caused Plaintiffs injuries. Since he was a member of the Sonoma County
 24 prosecutorial team, and acting as an agent of the Sonoma County Sheriff’s Department, Sonoma

1 County and the Sonoma County Sheriff's Department are also jointly and severally liable for his
 2 acts pursuant to Cal Gov Code § 815.2.

3

**C. SINCE MICHAEL POTTS WAS ACTING AS AN AGENT OF THE SONOMA
 4 COUNTY SHERIFF'S DEPARTMENT, THE SONOMA COUNTY BOARD OF
 5 SUPERVISORS WAS THE PROPER VENUE FOR THE PLAINTIFF TO SUBMIT A
 GOVERNMENT TORT CLAIM**

6 Cal Gov Code § 915 provides,

7 (a) A claim, any amendment thereto, or an application to the public entity for
 8 leave to present a late claim shall be presented to a local public entity by either of
 the following means:

9 (1) Delivering it to the clerk, secretary or auditor thereof.

10 (2) Mailing it to the clerk, secretary, auditor, or to the governing body at its
 principal office.

11 Since, Michael Potts was acting as an agent of the Sonoma County Sheriff's Department
 12 at the time of the incident, the Sonoma County Board of Supervisors was the proper local entity
 13 where Plaintiff was to submit his claim pursuant to Cal Gov Code §§ 911.2 and 915.

14

**D. PLAINTIFF SUBMITTED HIS TORT CLAIM TO THE PROPER
 15 LOCAL ENTITY.**

16 On March 7, 2007, Plaintiff presented his claim to the Sonoma County Board of
 17 Supervisors, dated March 6, 2007, against the Sonoma County actors pursuant to Cal Gov Code
 18 § 911.2. A copy of the claim presented is attached at PRJN Exhibit 2. The claim was then
 19 referred to the Risk Manager pursuant to Board of Supervisors Resolution No. 66798 and Cal
 20 Gov Code § 935.4. (See PRJN Exhibit 3)

21 On June 26, 2007 the County of Sonoma issued a blanket denial of Plaintiff's claim,
 22 without offering any objections or reasons. The blanket denial was mailed to the plaintiff's
 23 desired address on June 26, 2007. (See PRJN Exhibit 3)

24 "It is well settled that a substantial compliance with the requirement of statutes providing
 25 for the filing of such claims is all that is required. In such cases the courts look to see if the

1 purpose of the statute has been satisfied, whether there has been a bona fide attempt to comply
 2 with the statute, and whether any prejudice to the other party appears. In such cases the courts
 3 look to see if the purpose of the statute has been satisfied, whether there has been a bona fide
 4 attempt to comply with the statute, and whether any prejudice to the other party appears. Under
 5 the authorities, the controlling fact is what the claimant has done in filing or attempting to file the
 6 claim, and not whether or not the public body has had actual knowledge or has acted upon the
 7 claim. If the rule were otherwise, the public body could defeat any "substantial compliance" by
 8 failing to act on the matter." *Humphreys v. State, Dep't of Public Works* (1961) 192 Cal. App. 2d
 9 476, 481

10 Here, the Plaintiff submitted his government claim to the governing body of the Sonoma
 11 County Sheriff's Department, which is the entity under which Defendant Potts was acting within,
 12 during the investigation of underlying criminal matter. Therefore, Plaintiff substantially
 13 complied with the filing requirement of the government tort claim, with respect to submitting his
 14 claim to the proper governing body.

15

**E. SINCE DEFENDANT MICHAEL POTTS WAIVED HIS RIGHT TO RAISE A
 16 DEFENSE BASED UPON AN UNTIMELY CLAIM, THE CLAIM WAS EFFECTIVELY
 17 DEEMED TIMELY.**

18 Cal Gov Code § 911.3(b) provides,

19 (b) Any defense as to the time limit for presenting a claim described in
 20 subdivision (a) is waived by failure to give the notice set forth in subdivision (a)
 21 within 45 days after the claim is presented, except that no notice need be given
 22 and no waiver shall result when the claim as presented fails to state either an
 23 address to which the person presenting the claim desires notices to be sent or an
 24 address of the claimant.

25 Since, Sonoma County did not deny Plaintiff's Claim on the grounds that it was untimely
 26 and did not offer Plaintiff a written notice that his claim was not filed timely as required by Cal
 Gov Code § 911.3(a), Defendant POTTS waived any defense as to the time limit for presenting a
 claim as provided by Cal Gov Code § 911.3(b). Therefore, regardless as to when the cause of

1 action accrued against Michael Potts, the County of Sonoma and its agencies waived their
 2 defense based upon a theory that the claim was filed untimely.

3

**F. ASSUMING ARGUENDO, THAT PLAINTIFF'S GOVERNMENT CLAIM
 4 SUBMITTED TO SONOMA COUNTY IS DEEMED INSUFFICIENT AGAINST
 5 DEFENDANT POTTS, PLAINTIFF'S SECOND GOVERNMENT TORT CLAIM,
 6 SUBMITTED TO CALIFORNIA VICTIM COMPENSATION & GOVERNMENT
 7 CLAIMS BOARD, MAY BE PLED AS TIMELY FILED, BECAUSE A PETITION FOR
 8 LEAVE TO FILE A LATE CLAIM HAS BEEN FILED AND IS PENDING IN THE
 9 SUPERIOR COURT OF SONOMA COUNTY.**

10 In order to argue alternative theories with respect to Defendant Potts' liability, Plaintiff
 11 submitted a government claim to the California Victim Compensation & Government Claims
 12 Board (hereinafter "VCGCB") against Michael Potts.

13 Plaintiff's alternative theory is that Defendant Potts was acting as an agent of the
 14 California Department of Justice Bureau of Forensic Services while performing the acts alleged
 15 in the Complaint. (SAC ¶ 9)

16 While Plaintiff believed that the Sonoma County Board of Supervisor's was the proper
 17 governing body to which he was to submit the government tort claim to pursuant to Gov Code §
 18 915, Plaintiff additionally, submitted a claim to the VCGCB, which was received by the Board
 19 on March 9, 2007. (A true and correct copy of the claim submitted is attached at pages 7-10 of
 20 DOC 33-4 filed by Defendant Potts in this case)

21 On March 27, 2007, the VCGCB denied Plaintiff's claim, stating,

22 "We have reviewed your claim and determined that the VCGCB has no
 23 jurisdiction to consider the claim for the following reasons: Your claim was
 24 filed more than one from the date of the incident that is the basis of the claim,
 25 and it is too late for the Board to consider an application to present a late claim.

26 The VCGCB will take no further action on your claim. If you have any
 27 questions about this mater, please mention letter reference 47 and claim number
 28 G566507 when you call or write your claim technician of analyst at (800) 955-
 29 0045." (See Denial at PRJN Exhibit 3)

1 On August 8, 2007, Plaintiff submitted an application to VCGCB to reinstate the original
 2 claim or in the alternative for permission to present a claim not timely presented. (See
 3 application at PRJN Exhibit 4) The VCGCB did not respond to the application.

4 On March 5, 2008, Plaintiff filed a Petition for Order Relieving Petitioner from
 5 Provisions of Govt Code § 945.4. (See Petition at PRJN Exhibit 5)

6 A hearing on the petition is currently set for July 9, 2008. (See Notice of Hearing at
 7 PRJN Exhibit 6)

8 "It is well established that the filing of a claim--relief petition is not an election of
 9 remedies which precludes the petitioner from filing and pursuing a separate complaint alleging
 10 timely compliance with the claims presentation requirement." *Mandjik v. Eden Township Hosp.*
 11 *Dist.* (1992) 4 Cal. App. 4th 1488, 1499 Further, "A public entity cannot assume that a claim is
 12 not timely presented just by the fact that a claim and an application for leave to file a late claim
 13 are presented at the same time. Nor is a public entity permitted to make factual determinations
 14 relating to the timeliness of a claim; to permit the public entity to do so would be to deny the
 15 claimant his right to a jury trial on disputed factual issues." *Id.* at 1500

16 Here, the plaintiff elected to file both a Complaint in the immediate case and a claim--
 17 relief petition. Therefore, pursuant to *Mandjik supra*, Plaintiff may allege timely compliance, as
 18 alleged at (SAC ¶ 47).

19

20 **G. ADDITIONALLY, THE CLAIM IS EFFECTIVELY TIMELY FILED, BECAUSE
 DEFENDANT POTTS, ACTING AS AN AGENT OF THE DOJ, WAIVED HIS
 DEFENSE BASED UPON AN UNTIMELY FILED CLAIM.**

21

22 When a government actor denies a claim on the grounds that it was untimely, Cal
 23 Gov Code § 911.3(a) requires that the denying board issue a statement that is substantially
 24 similar to the following form:

25 "The claim you presented to the (insert title of board or officer) on (indicate date)
 26 is being returned because it was not presented within six months after the event or
 occurrence as required by law. See Sections 901 and 911.2 of the Government

Code. Because the claim was not presented within the time allowed by law, no action was taken on the claim.

Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim. See Sections 911.4 to 912.2, inclusive, and Section 946.6 of the Government Code. Under some circumstances, leave to present a late claim will be granted. See Section 911.6 of the Government Code.

You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately." (Cal Gov Code § 911.3(a))

7 Here, VCGCB failed to provide a statement that is substantially similar to the form
8 required by Cal Gov Code § 911.3(a) when denying Plaintiff's claim. Therefore, Defendant
9 POTTS, waived his defense as to the time limit for presenting a claim with respect to
10 employment in the DOJ.

II.

**PLAINTIFF'S CLAIMS FOR RELIEF BASED UPON ALLEGATIONS OF
FALSE ARREST AND FALSE IMPRISONMENT WERE BROUGHT
WITHIN THE APPLICABLE STATUTE OF LIMITATIONS.**

15 Assuming arguendo, that Defendant POTTS' assertion that Plaintiff's cause of action
16 against POTTS accrued on June 6, 2002, the Plaintiff's Action was filed within the statute of
17 limitations.

18 While Defendant POTTS is correct that pursuant to Cal Code Civ Proc § 352.1 a
19 person entitled to bring an action is, at the time the cause of action accrued, imprisoned on a
20 criminal charge ... the time of that disability is not a part of the time limited for the
21 commencement of the action, not to exceed two years. However, POTTS neglected to note
22 that Cal Gov Code § 945.3 tolls the statute of limitations, while the charges against the
23 accused are pending before a superior court.

24 “State law determines the statute of limitations for claims brought under 42 U.S.C. §
25 1983. The Court held the statute of limitations for all section 1983 claims to be the forum state’s

1 statute of limitations for personal injury torts. In California, this period is one year. *Harding v.*
 2 *Galceran* (9TH Cir. 1989) 889 F.2d 906, 907
 3 “[Cal. Gov’t Code § 945.3] prevents civil actions against peace officers from being filed while
 4 criminal charges are pending against the potential plaintiff. The section also tolls the statute of
 5 limitations on the civil actions until the criminal charges are resolved. ... [A]lthough section
 6 945.3 may not prohibit a potential plaintiff from bringing a section 1983 claim against a peace
 7 officer while criminal actions are pending, section 945.3’s tolling provision may still apply to toll
 8 the limitations period while criminal actions are pending against the potential plaintiff. *Id.* at
 9 907-908

10 Here, Plaintiff was imprisoned while criminal charges were pending in the underlying
 11 criminal matter that was related to this case. On September 29, 2006 the underlying criminal
 12 prosecution concluded with an acquittal by jury and Plaintiff was released from custody.

13 On August 20, 2007, Plaintiff filed this lawsuit against all of the defendants. Therefore,
 14 this civil action was filed within the one-year statute of limitations, which was tolled until
 15 September 29, 2006.

16

17 III.

18 THE SECOND AMENDED COMPLAINT CONFORMS TO THE PROVISIONS OF 19 RULE 8, AND PROVIDES PROPER NOTICE TO DEFENDANT POTTS, THEREFORE IT SHOULD NOT BE DISMISSED.

20 The sufficiency of the complaint has been discussed in detail in Plaintiff’s Opposition to
 21 County Defendants’ Motion to Dismiss filed herewith, thus Plaintiff hereby incorporates said
 22 brief in this Opposition to Defendant, Michael Potts’ Motion to Dismiss.

23 With respect to Defendant, POTTS’ assertion that the holding in *Albright v. Oliver*
 24 (1994) 510 U.S. 266 proscribes § 1983 relief for claims that contain allegations related to
 25 substantive due process rights in a malicious prosecution action, POTTS’ assertion is misplaced.
 26 In *Albright v. Oliver* (1994) 510 U.S. 266, the Supreme Court affirmed The Court of Appeals

1 holding that prosecution without probable cause is a constitutional tort actionable under § 1983
 2 only if accompanied by incarceration, loss of employment, or some other palpable consequence.
 3 Here, there was no incarceration, therefore *Albright* does not apply to this case.

4 Substantive due process protects individuals from arbitrary deprivation of their liberty by
 5 government. *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 845-49. The Court has
 6 repeatedly "spoken of the cognizable level of executive abuse of power as that which shocks the
 7 conscience." *Id.* at 846. A threshold requirement to a substantive or procedural due process
 8 claim is the plaintiff's showing of a deprivation of liberty or property interest protected by the
 9 Constitution. *Board of Regents v. Roth*, 408 U.S. 564, 569

10 Here, Plaintiff lost his liberty as a result of Defendant, POTTS, failure to complete his
 11 analysis, and his falsified report connected to the key piece of evidence, which led to Plaintiff's
 12 arrest.

13

14

IV.

15

WITH RESPECT TO THE APPLICATION OF § 1983 CLAIMS AGAINST DEFENDANT POTTS IN HIS OFFICIAL CAPACITY, PLAINTIFF SUBMITS THE MATTER TO THE COURT

16

17

This matter regarding §1983 claims against POTTS in his official capacity is hereby
 submitted.

18

19

V.

20

CONCLUSION

21

Defendant, POTTS', Motion to Dismiss on the grounds the government claim was
 untimely, must be denied, where as a matter of law the Defendant POTTS waived his right to
 raise a defense based upon an untimely claim.

22

23

The Complaint was timely filed, therefore, POTTS' Motion to Dismiss on the grounds
 that the complaint was filed beyond the limitations of the action must be denied.

24

25

26

1 The complaint was sufficient pursuant to Rule 8, and should not be dismissed. In the
2 alternative, on this issue, the Plaintiff should be granted leave to amend where necessary.

3

4 Dated: May 22, 2008

5 Respectfully submitted,

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7 -----/s/-----
8 Editte Lerman
9 Attorney for Plaintiff
10 Zachariah Rutledge

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DECLARATION OF SERVICE

I, Editte D. Lerman, declare as follows:

I am a resident of the State of California, residing or employed in Mendocino, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 45060 Ukiah Street P.O. Box 802, Mendocino C.A. 95460.

On May 22, 2008,

PLAINTIFF'S OPPOSITION TO DEFENDANT MICHAEL POTTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT; POINTS AND AUTHORITIES

was filed and served upon the following parties via the Court's PACER-ECF electronic filing system.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 22nd day of May, 2008, at Mendocino, California.

-----/s/-----
Editte Lerman